# Affin-ACF Finance Bhd v APMG Management Sdn Bhd

HIGH COURT (JOHOR BAHRU) — WINDING UP PETITION NO (MT-1) 28–25 OF 2002
SYED AHMAD HELMY JC
20 MAY 2002

***Civil Procedure*** *— Transfer of proceedings — Whether High Court Johor Bahru could proceed with hearing of petition — Courts of Judicature Act 1964 s 20*

***Companies and Corporations*** *— Winding up — Inability to pay debts — Respondent failed to comply with the statutory notice issued under s 218 of the Companies Act 1965 — Whether petitioner failed to prove existence of debt due — Companies Act 1965 s 218 — Companies Winding Up Rules 1972 rr 26, 30*

This petition for winding up was presented by the petitioner on 29 January 2002 seeking to wind up the respondent owing to the failure of the respondent to comply with the statutory notice issued under s 218 of the Companies Act 1965 ('the Act') dated 21 September 2001 requiring the respondent to pay the sum of RM45,468.79 together with interests and costs, due under a judgment dated 22 November 1999 given by the Kota Kinabalu Sessions Court in Summons No 52–975 of 1999 within 21 days from the date of service thereof. On the hearing date, the respondent, through their counsel objected to the hearing of the petition on two grounds: (i) that the application had been made vide a letter dated 30 April 2002 to transfer the proceedings to the Kuala Lumpur High Court on the reasoning that the registered office of the respondent was in Kuala Lumpur, the respondent did not have any business operation in Johor Bahru and forum conveniens; and (ii) the petitioner had failed to prove the existence of a debt due and owing by the respondent owing to their failure to exhibit the judgment upon which the statutory notice was founded.

**Held**:

(1) A transfer application did not in any way debar or preclude the court from proceeding with the hearing of the petition which was placed before it. The application by itself did not operate as a stay on the Johor Bahru High Court's jurisdiction to adjudicate on the matter over which it had exclusive jurisdiction unless and until the transfer directive pursuant to s 20 of the Courts of Judicature Act 1964 was approved by his Lordship CJ (Malaya). To hold otherwise would result in an automatic stay on the original court's jurisdiction in all transfer applications. The court dismissed the objection (see p 234E–F).

(2) On the second ground of failure to exhibit the judgment, the court ruled against the respondent. A winding up petition is a pleading, setting out a party's case in detail and made in open court and must set out the material facts on which the petitioner rely on and

such particulars to clarify the precise nature of his case. The petition should not contain a statement of the evidence by which those facts are to be proved (see p 234G–H).

(3) In para 6 of their petition, the petitioner pleaded the material fact of the respondent's non-compliance with the statutory notice and was affirmed as the truth by the petitioner in the affidavit verifying the petition of the branch manager of the petitioner in encl 3 as required by r 26 of the Companies Winding Up Rules 1972 ('the Rules'). Affirmation under oath as such was prima facie evidence of the averment of the judgment obtained against the respondent upon which the statutory notice was issued. The affidavit verifying the petition was admissible for providing evidence of the truth of the statements in the petition, even though such evidence may be hearsay (see pp 234H–235B).

(4) The Rules specifically provide, by r 30, the necessity of filing an affidavit in opposition within the time frame. This requirement had been held by the Court of Appeal to be mandatory in nature (see p 235C–D); *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 followed.

(5) Not only had the petitioner proven the debt due through the failure of the respondent to comply with the statutory notice, but the commercial insolvency of the respondent was uncontrovertibly established by three supporting creditors whose total claim amounted to RM1,660,038.57 (see p 235E).

**[Bahasa Malaysia summary**

Petisyen untuk penggulungan ini telah dikemukakan oleh pempetisyen pada 29 Januari 2002 memohon untuk menggulung responden akibat kegagalan responden mematuhi notis statutori yang dikeluarkan di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') bertarikh 21 September 2001 yang menghendaki responden membayar jumlah RM45,468.79 berserta faedah dan kos, yang perlu dibayar di bawah satu penghakiman bertarikh 22 November 1999 yang telah diputuskan oleh Mahkamah Sesyen Kota Kinabalu dalam Saman No 52–975 tahun 1999 dalam tempoh 21 hari daripada tarikh penyampaian tersebut. Pada tarikh perbicaraan tersebut, responden, melalui peguam mereka telah membantah terhadap perbicaraan petisyen tersebut atas dua alasan: (i) bahawa permohonan tersebut telah dibuat melalui sepucuk surat bertarikh 30 April 2002 untuk memindahkan prosiding tersebut ke Mahkamah Tinggi Kuala Lumpur oleh sebab pejabat berdaftar responden adalah di Kuala Lumpur, responden tidak mempunyai apa-apa urusniaga dan forum conveniens di Johor Bahru; dan (ii) pempetisyen telah gagal untuk membuktikan terdapat hutang yang perlu dibayar dan tertunggak oleh responden atas kegagalan mereka mengekshibitkan penghakiman di mana terdapat notis statutori tersebut.

**Diputuskan:**

(1) Satu permohonan pindahan tidak dalam apa cara menyekat atau menghalang mahkamah ini daripada terus mendengar petisyen yang dihadapkan. Permohonan tersebut dengan sendirinya tidak beroperasi sebagai satu penggantungan berdasarkan bidang kuasa Mahkamah Tinggi Johor Bahru untuk mengadili perkara yang ia mempunyai bidang kuasa eksklusif ke atasnya kecuali dan sehingga arahan pemindahan diberikan menurut s 20 Akta Kehakiman Mahkamah 1964 diluluskan oleh Yang Amat Arif HB (Malaya). Untuk berpendapat sebaliknya akan mengakibatkan satu penggantungan automatik berdasarkan bidang kuasa asal mahkamah dalam semua permohonan-permohonan pindahan (lihat ms 234E–F).

(2) Berdasarkan alasan kedua tentang kegagalan untuk mengekshibitkan penghakiman tersebut, mahkamah memutuskan sebaliknya terhadap responden. Satu petisyen penggulungan merupakan satu pli, yang menyatakan kes satu pihak secara terperinci dan dibuat di mahkamah terbuka dan harus menyatakan fakta-fakta material yang petisyen bergantung kepada dan butir-butir sedemikian adalah untuk menjelaskan sifat khusus kes beliau. Petisyen tersebut tidak sepatutnya mengandungi satu pernyataan tentang keterangan bagaimana fakta-fakta tersebut telah dibuktikan (lihat ms 234G–H).

(3) Dalam perenggan 6 petisyen mereka, pempetisyen telah memplikan fakta material tentang ketidakpatuhan responden terhadap notis statutori yang telah disahkan sebagai yang benar oleh pempetisyen dalam afidavit beliau yang mengesahkan petisyen oleh pengurus cawangan pempetisyen dalam lampiran 3 sebagaimana yang dikehendaki oleh k 26 Kaedah-Kaedah Penggulungan Syarikat 1972 ('Kaedah tersebut'). Pengesahan atas akuan sumpah begini adalah keterangan prima facie tentang penegasan tentang penghakiman yang diperolehi terhadap responden di mana notis statutori tersebut telah dikeluarkan. Afidavit yang mengesahkan petisyen tersebut boleh diterima bagi mengemukakan keterangan sebenar tentang pernyataan-pernyataan dalam petisyen tersebut, walaupun keterangan sedemikian mungkin dengar cakap (lihat ms 234H–235B).

(4) Kaedah tersebut dengan khususnya memperuntukkan, melalui k 30, keperluan untuk pemfailan satu afidavit membangkang dalam tempoh yang ditetapkan. Keperluan ini telah diputuskan oleh Mahkamah Persekutuan yang bersifat mandatori (lihat ms 235C–D), *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 diikut.

(5) Bukan sahaja pempetisyen telah membuktikan terdapat hutang yang perlu dibayar melalui kegagalan responden untuk mematuhi notis statutori tersebut, tetapi ketidaksolvenan komersial responden tidak dapat disangkal oleh tiga pemiutang

penghakiman sokongan yang mempunyai tuntutan keseluruhan berjumlah RM1,660,038.57 (lihat ms 235E).]

**Notes**

For cases on inability to pay debts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 831–882.

**Cases referred to**

*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 (folld)

*Re Wallace Smith & Co Ltd* (1992) BCLC 970 (refd)

**Legislation referred to**

Companies Act 1965 s 218

Companies (Winding Up) Rules 1972 rr 26, 30, 32(1)(a), (b), (d), (e)

Courts of Judicature Act 1964 s 20

*Chor Por Ron* (*Leng & Co*) for the petitioner.

*Francis Goh* (*Francis Goh & Co*) for the respondent.

**Syed Ahmad Helmy JC**: The petition herein was presented by the petitioner on 29 January 2002 and the hearing was fixed on 20 May 2002. As appears in para 6 of the petition, the petitioner seeks to wind up the respondent company owing to the failure of the respondent to comply with the statutory notice dated 21 September 2001 issued under s 218 of the Companies Act 1965 requiring the respondent to pay the sum of RM45,468.79 together with interest at the rate of 13.83% pa calculated up to 21 September 2001 and costs of RM850 due under judgment dated 22 November 1999 given by the Kota Kinabalu Sessions Court in Summons No 52–975–99 within 21 days from date of service thereof. The statutory notice was served on the respondent's registered office at Lot 6, 28th Floor, Imbi Plaza, 28 Jalan Imbi, 55100 Kuala Lumpur (the 'registered office') on 25 September 2001 as appears by the statutory declaration of Samsuri bin Son'an exhibited as exh A in the petition in encl 2. The affidavit verifying the petition appears in encl 3 and was filed on 31 January 2002.

The petition dated 29 January 2002 and the affidavit verifying petition dated 30 January 2002 and filed on 31 January 2002 was served on the respondent company on 8 March 2002 by leaving it at its registered office as appears by the affidavit of service of Samsuri bin Son'an in encl 4.

Upon due compliance with the requirements of r 32(1) (a), (b), (d) and (e) of the Companies (Winding Up) Rules 1972 ('the Rules') the petitioner duly obtained the registrar's certificate on 22 April 2002.

On the hearing date on 20 May 2002, the respondent appeared through their counsel, Mr Francis Goh. The petitioner's counsel, Mr PR Chua, handed the List of creditors which comprised three supporting creditors

who had earlier filed their respective notices of intention to appear. The total debt due to the three supporting creditors amounted to approximately RM1,660,038.57. A

Mr Francis Goh, on behalf of the respondent, objected to the hearing of the petition on two grounds:

(i) application had been made vide letter dated 30 April 2002 to his Lordship CJ (Malaya) for transfer of the proceedings to the Kuala Lumpur High Court on the reasoning that the registered office of respondent is in Kuala Lumpur, the respondent does not have any business operation in Johor Bahru and forum conveniens; and B

(ii) the petitioner has failed to prove the existence of a debt due and owing by the respondent owing to their failure to exhibit the judgment upon which the statutory notice was founded. C

Counsel for the petitioner, Mr PR Chua, disputed the respondent counsel's submission that the respondent has no harness operations in Johor Bahru and through their letter of 10 May 2002 addressed to his Lordship CJ (Malaya), opposing the respondent's application for transfer, enclosed the particulars issued by the registrar of companies which showed that the respondent company has a business address in Johor Bahru at No 2A–02, Jalan Suria 19, Taman Putra, Johor Bahru. Petitioner's counsel also enclosed a copy of the minutes of meeting of the directors of the respondent held on 21 June 1997, at the business address at No 2A–01, Jalan Suria, Taman Putra, Johor Bahru. D E

Turning to the first ground of objection raised by the respondent, it is my judgment that a transfer application does not in any way debar or preclude this court from proceeding with the hearing of the petition which is placed before it. The application by itself does not operate as a stay on the Johor Bahru High Courts' jurisdiction to adjudicate on the matter over which it has exclusive jurisdiction unless and until the transfer directive pursuant to s 20 of the Courts of Judicature Act 1964 is approved by his Lordship CJ (Malaya). To hold otherwise would result in an automatic stay on the original court's jurisdiction in all transfer application. Hence, I dismissed the respondent's objection. F G

On the second ground of failure to exhibit the judgment, again I must rule against the respondent. A winding up petition is by its nature a pleading, setting out a party's case in detail and made in open court — *Odger's Principles of Pleading and Practice* (21st Ed) at p 321. Accordingly, a petition must set out material facts on which the petitioner relies and such particulars as are sufficient to clarify the precise nature of his case. The petition should not contain a statement of the evidence by which those facts are to be proved. It should be observed that the petitioner has in para 6 of their petition pleaded the material fact of the respondent's non-compliance with the statutory notice based on the judgment of the Kota Kinabalu Sessions Court dated 22 November 1999 Summons No 52–975–99. The plea aforesaid was affirmed as the truth by the petitioner in the affidavit verifying the petition of the branch manager of the petitioner, Sheh Yunn H I

Chaur @ George Sheh in encl 3 as required by r 26 of the Rules which expressly states that the verifying affidavit shall be prima facie evidence of the statements in the petition. Hence affirmation under oath as such is prima facie evidence of the averment of the judgment obtained against the respondent upon which the statutory notice was issued. I must categorically state that by virtue of r 26 of the Rules, the affidavit verifying the petition is admissible for the purpose of providing evidence of the truth of the statements in the petition, even though such evidence may be hearsay. As was stated by Edward Nugee QC in *Re Wallace Smith & Co Ltd* (1992) BCLC 970 at p 981:

> The affidavit verifying a winding up petition is not a meaningless formality. The court must be able to rely upon it as stating the honest unqualified belief of the deponent.

It is also appropriate at this juncture to emphasize that the Rules which regulates the procedure relating to the winding up of companies specifically provides by r 30, the necessity of filing an affidavit in opposition within the time frame as stipulated therein should the respondent wish to oppose the petition. The requirement in r 30 have been held by the Court of Appeal to be mandatory in nature and must be strictly complied with — *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 3 CLJ 485. In the absence of such opposing affidavit, the evidence of the judgment debt through the affidavit verifying petition becomes the only available evidence before the court of the debt due and owing by the respondent.

It should also be emphasized that not only has the petitioner proven the debt due through the failure of the respondent to comply with the statutory notice based on the judgment debt but the commercial insolvency of the respondent is uncontrovertibly established by the three supporting creditors whose total claim amounted to RM1,660,038.57.

Having considered all available evidence placed before me, I accordingly ordered that the respondent company be wound up under the provisions of the Companies Act 1965 and appointed the official receiver as the provisional liquidator of the respondent company. I also allowed the petitioner's costs for the winding up be taxed and be paid out of the assets of the company.

*Order accordingly.*

Reported by Chew Phye Aun